

1 UNITED STATES COURT OF FEDERAL CLAIMS

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4 NORTHERN CALIFORNIA POWER)

5 AGENCY, et al.,)

6 Plaintiffs,) Case No.

7 vs.) 14-817C

8 THE UNITED STATES OF AMERICA,)

9 Defendant.)

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12 Courtroom 7

13 Howard T. Markey National Courts Building

14 717 Madison Place, N.W.

15 Washington, D.C.

16 Wednesday, June 17, 2015

17 10:00 a.m.

18 Telephonic Status Conference

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21 BEFORE: THE HONORABLE THOMAS C. WHEELER

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25 Sara J. Vance, CERT, Digital Reporter and Transcriber

Northern California Power Agency, et al. v. USA

6/17/2015

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24 ALSO PRESENT:

25 Carter Brown, Department of Interior

Northern California Power Agency, et al. v. USA

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1 P R O C E E D I N G S

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3 (Proceedings called to order, 10:00 a.m.)

4 THE COURT: Good morning.

5 ALL COUNSEL: Good morning.

6 THE COURT: Please be seated.

7 We're on the record this morning in the case of
8 Northern California Power Agency, et al., vs. The United
9 States, Docket Number 14-817C. And let us begin with the
10 introductions of counsel, first for the Plaintiff.

11 MR. RALSTON: Good morning, Your Honor, David
12 Ralston, appearing counsel of record for the Plaintiff,
13 Northern California Power Agency, and others. And with me
14 are my colleagues from Foley & Lardner, Jay Varon, Jennifer
15 Forde, Anna Ross, and Frank Murray.

16 THE COURT: Welcome. Nice to have all of you.

17 MR. RALSTON: Thank you, Judge.

18 MR. MURRAY: Thank you, Your Honor.

19 THE COURT: And for the United States?

20 MR. OLIVER: Yes, hi. Davis Oliver, the Department
21 of Justice, representing the Department of Interior in this
22 matter. I have agency counsel from the Department of
23 Interior, Mr. Carter Brown, here.

24 MR. BROWN: Hello.

25 THE COURT: All right. Welcome to you gentlemen.

1 As you know, I recently received this case by
2 transfer from Judge Block, and I saw right away that there
3 was a fully briefed motion, so I thought we'd get right to
4 it. And that's why we're here today to hear your oral
5 arguments on the motion to dismiss.

6 So, it's your motion, Mr. Oliver, would you like to
7 begin?

8 MR. OLIVER: Yes, Your Honor.

9 May it please the Court. Plaintiffs' illegal
10 exaction claim is unlike any other illegal exaction claim for
11 which this Court has found that it has jurisdiction over
12 because there is a fundamental disconnect between its claim,
13 its illegal exaction claim, and the statute upon which it's
14 based. And that disconnect is that the claim is premised
15 upon the Section 3407 of the Central Valley Project
16 Improvement Act.

17 It's based upon there being a right to a
18 proportional assessment; that is, that water users and power
19 users must be assessed in equal -- in proportion to their
20 repayment allocation costs. What that means is there's a
21 certain amount of cost that they have to repay for
22 contributing to the Central Valley Project, based upon the
23 benefits that power gets and the water users get, and that
24 the -- this restoration fund, which is the fund at issue,
25 Reclamation assesses both of these -- the water and the power

1 users.

2 The relevant language is that the water and power
3 users must -- shall be assessed to the greatest extent
4 practical in the same proportion as their repayment
5 allocation. So, that -- so, there is a disconnect between a
6 claim based upon a right to a proportional assessment and the
7 language, which says that Interior shall, to the greatest
8 extent practical, achieve that, because what that language
9 does is that it -- if you didn't have that language in which
10 it was actually an earlier version of that bill, as I point
11 out in the brief, actually did have that language and was
12 just a flat out you have a right to proportional assessment.

13 With that --

14 THE COURT: That sounds more like summary judgment
15 material rather than a jurisdictional challenge.

16 MR. OLIVER: Well, let's maybe go to the relevant
17 standard, actually, and the Fed Circuit has said in Norman
18 vs. The United States that to demonstrate illegal exaction
19 jurisdiction the plaintiff must demonstrate that there --
20 that the statute in question provides either expressly or by
21 necessary implication a remedy for the alleged unlawful
22 exaction.

23 And here, what our argument is is that the statute
24 upon which they're based does not have a remedy for
25 nonproportional assessment. The statute does not guarantee

1 or require nonproportional assessment it requires that
2 Interior do it, and this -- our interpretation of the
3 statute, which is, I think, correct, it requires that
4 Interior strive to do everything it practically can to
5 achieve that goal, but it's not a guarantee.

6 And, so, I think in order to put this in context,
7 in order to understand what the place of this proportionality
8 mandate is in the statute, we must understand how it
9 interacts with other statutory objectives that the Department
10 of Interior --

11 THE COURT: But let's assume that the Plaintiffs'
12 allegations are correct, and I think we must assume that for
13 purposes of a motion to dismiss, if the Plaintiff says that
14 the Government has charged them too much money, can't they
15 file suit here and get it back?

16 MR. OLIVER: Well --

17 THE COURT: Even under the Norman standard.

18 MR. OLIVER: No. We'd argue no, they cannot
19 because their theory -- their claim as to how they can get it
20 back has to match up with the statutory language. They can't
21 just claim that, well, money was taken from us and there's a
22 statute out there that entitles us to it. We have to --
23 actually have to look under Norman. You have to actually
24 look at the statute and determine whether or not the statute
25 either necessarily expressly, which the courts have not --

1 you know, expressly provides a remedy for the unlawful
2 exaction or by necessary implication.

3 Our argument is that it -- that the statute, given
4 the language that Congress intentionally inserted into the
5 relevant provision, that shall to the greatest extent
6 practical achieve proportionality, that Congress is saying
7 that proportionality is not a guarantee; proportionality is
8 not a right; it is a goal that we want Interior to strive
9 toward. And the reason -- and it's important to take -- to
10 understand the context of this, because this statutory goal
11 of proportionality is -- must be understood in relation to
12 other statutory objectives that are related to it.

13 In Section 3407, there is a -- there is a \$30
14 million -- there is a provision that provides that Interior
15 is to assess up to \$30 million on a three-year rolling
16 average for both water and power users. And, importantly --
17 actually, 3407(c) is, to the extent required in the
18 Appropriations Act, the Secretary shall assess these
19 additional -- these payments.

20 Now, as we argue in our briefs, the appropriations
21 each year has directed Interior to assess the full amount,
22 the \$30 million. And, so, one competent -- so, one statutory
23 objective is you must collect this \$30 million from water and
24 power. The second one that's related is the fact that
25 Congress capped how much water could be assessed with respect

1 to this \$30 million. It did not cap power, but it did cap it
2 with water, specifically in 3407(d), it provides that the
3 maximum that water can be charged would be \$6 per acre-foot
4 for agricultural users and then \$12 per acre foot for
5 municipal.

6 But the point is, is that if you -- if you're going
7 to say you must collect \$30 million from these users but then
8 you cap how much water is going to be charged, then power's
9 contribution to this fund is going to necessarily vary with
10 what water can do in a particular year. So, if there's a
11 drought, as has been the case, I'm sure Your Honor is aware
12 in California, if there's a drought and water is not able to
13 produce a lot, then that's going to necessarily affect how
14 much power is going to be able to contribute to -- or has to
15 contribute in order to meet that \$30 million statutory
16 objective.

17 And, so, that affects proportionality, because then
18 Reclamation is stuck with -- or faced with a situation where
19 if water's not delivering and therefore power has to
20 contribute more, then that affects how much they can achieve
21 proportionality. And all this ties back to the remedy
22 because, again, Congress is saying this is a goal, we want
23 proportionality, yes, it's a good thing, and, yes, you shall
24 ascribe to it, but you might not reach it.

25 THE COURT: Hang on just one second. I don't know

1 whether the Plaintiffs are going to prevail on the merits or
2 not, but they have alleged that there's a problem in the way
3 in which the fees have been assessed, that they've been
4 required to pay too much. Can't this Court hear their claim?

5 MR. OLIVER: Well, I would argue under this statute
6 and under -- based upon what their claim is, no. They don't
7 have jurisdiction, and the reason for that is that their
8 claim -- the reason they think that they have paid too much
9 money, they're very clear in their complaint. And I think
10 that's what we must focus upon, what is their claim, because
11 Norman says what -- focus on the remedy that's implicit from
12 the statute if we want to understand what their claim is.

13 Their claim is that there is a right to
14 proportional assessment and, therefore, the difference
15 between what they're being assessed and what would be a
16 proportional assessment is what they're owed. That's the
17 basis of their claim. That's the basis of their illegal
18 exaction claim. So, the question, then, as a matter of
19 jurisdiction, is, well, does the statute imply a remedy for
20 that situation.

21 And the answer would be yes, if Congress had
22 adopted the earlier version of this bill, which says that --
23 that the water users and power users shall be assessed in
24 proportion to their repayment allocation share. And,
25 clearly, we have illegal exaction -- regardless of the

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1 merits, we clearly -- the Court would have jurisdiction
2 because they're claiming we're being assessed beyond what was
3 proportional. But that doesn't match up. That goes back to
4 my original point about their disconnect. That's not what
5 the statute says.

6 THE COURT: Well, I think I can still hear about
7 whether or not the Government has met this goal. I mean,
8 that sounds like a fact inquiry to me, and on which I should
9 hear evidence. But to me it doesn't mean that I can't hear
10 the case.

11 MR. OLIVER: Well, if their claim was that they're
12 owed the difference between what Reclamation can do using its
13 best efforts and given what's practical versus what they're
14 being assessed, that might be one situation, but the
15 complaint was fairly clear about what their claim is.

16 And if they're going to change their claim and so,
17 oh, no, we're actually just going to argue that we're just
18 owed the difference between the best that Reclamation can do
19 under the circumstances, given these various statutory
20 objectives and what they're assessed, okay, but if that's the
21 battlefield, then we're certainly -- we're willing to -- you
22 know, we're willing to go under that, and we think that --
23 you know, if that's their claim, then, certainly, you're
24 right, summary judgment is where we should go and figure out
25 if there's any difference.

1 We argue that there's not for the reasons we
2 mentioned. But reading their complaint, that is not what
3 they're saying. They're saying that we have a right to a
4 proportional assessment; you're assessing beyond that; give
5 us the difference. That's the illegal exaction. If that's
6 their claim, and I'm sticking -- I'm sticking to what they've
7 articulated in their complaint. They could have articulated
8 something different; they didn't. They articulated a
9 complaint, an illegal exaction claim, specifically based upon
10 a failure to achieve proportional assessment, which rests
11 upon the premise that there is a right to proportional
12 assessment.

13 Most illegal exaction claims, Your Honor knows,
14 this is not even an issue. You have a statute and there's an
15 exaction of a fee or some amount of money. The question is
16 was that illegal exaction or not. It's not return of the
17 money. So, the issue of, well, does the statute imply,
18 remember, it normally doesn't come up because usually it
19 does.

20 But in the case here, where Congress was very
21 intentional about inserting this language about to the
22 greatest extent practical, that does throw a wrench and that
23 does throw -- that poses a jurisdictional issue and a
24 jurisdictional problem as to what is the remedy here based
25 upon what their complaint is. And, so, I would argue that

1 this squarely is a jurisdictional issue, that it rests upon,
2 you know, again, that disconnect between what their claim is
3 and what the statute actually says and provides.

4 And, so, I want to stress that we're not arguing
5 that Reclamation doesn't have any duties whatsoever with
6 respect to proportionality. I mean, I think in their brief
7 they're suggesting, oh, well, the Bureau of Reclamation has
8 unfettered discretion, this can't be the case that there's no
9 remedy here and they can do whatever they want. That's not
10 the case. The language does say "shall" to the extent -- to
11 the greatest extent practical achieve proportionality or it
12 shall -- you know, it shall be proportional.

13 So, they have an obligation to strive for that, and
14 I think that -- and, so, for instance, if -- and this is not
15 the case, but if the Bureau of Reclamation, for instance,
16 were not charging the full amount of water, you know, the
17 limits 6 and 12, you know, they would say, oh, we're going to
18 charge them 3 and 2 instead or something -- a similar random
19 lower figure, then that could be -- they'd know, you actually
20 have to charge the maximum because you have to max -- you
21 know, that's irrational and arbitrary, irrational to charge
22 us -- you know, to -- even more than what the statute would
23 provide. You know, that's not the case here.

24 If -- and I'll also point -- to underscore my point
25 about, you know, their argument that, well, what obligation

1 does the Bureau have at all, the notice -- I think they
2 submitted a notice of authority yesterday or the day before,
3 two cases, one of which, the Department of Transportation vs.
4 Association of American Railroads, and the subject matter of
5 the case isn't really relevant, but the subject matter is
6 whether or not -- or the holding, rather, is whether Amtrak
7 is a governmental entity for purposes of their establishing
8 metrics and standards as to, you know, trains being on time
9 and so forth, and the Court found that it was.

10 But the more -- the part that perhaps has some tie
11 to this case is the language and the relevant act for that
12 case, the Passenger Rail Investment Improvement Act, so that
13 Amtrak and private rail carriers shall incorporate those
14 metrics and standards into their agreements whenever
15 practicable.

16 And, so, in their notice they focused on the
17 concurrence of Alito and Thomas. We'll start with Thomas.
18 Thomas said that the metrics and standards met -- satisfy the
19 common carrier obligations to provide -- well, what I just
20 said, Amtrak shall and its carriers shall include the metrics
21 in their contracts to the extent practical. And then Thomas
22 says, as Justice Alito explained, it matters little that the
23 railroads may avoid incorporating the metrics and standards
24 as far as that incorporation is impracticable. The point is
25 that they have a legal duty to try.

1 We completely agree with that in terms of our
2 case, a legal duty of Reclamation to try to achieve
3 proportionality, but the point is is that it's a goal. It's
4 a goal. It's not a guarantee. Their claim -- their illegal
5 exaction is premised upon the notion that it is a guarantee
6 and, therefore, we're owed money because you guys did not --
7 you assesses us in a nonproportional fashion.

8 So, as I mentioned before, that disconnect poses a
9 jurisdictional problem here because there is not a remedy for
10 nonproportional assessments, which is what their claim is.

11 THE COURT: Well, we'll take a close look at the
12 complaint again just to fully understand that, but it seems
13 to me that surely I can hear the Plaintiffs' case on whether
14 the Government has done a reasonable effort to meet their
15 goal. I mean, I don't know what the evidence will show, and
16 as I said, I don't know if they'll prevail, but it seems like
17 this is a case that I certainly can hear.

18 MR. OLIVER: Right, well, Your Honor, if what
19 they're alleging is that -- if their complaint is simply that
20 we did not do what -- we did not take, you know, the steps
21 necessary to practically achieve proportionality as opposed
22 to actually achieving it, if they agree our obligation is to
23 do the best we can to achieve it, even if we fall short, and
24 if that's what their complaint is, which is not how I read
25 their complaint, but if that's what it is, then -- then we

1 certainly will be happy to, you know, in summary judgment to
2 show that what the Bureau of Reclamation did, you know, is
3 actually all that they could do, you know, to achieve
4 proportionality for the reasons I mentioned.

5 Congress says we must meet \$30 million, then -- and
6 water is capped at a certain amount every year based upon
7 what water can do, then power -- and they're charging power
8 exactly, you know, what they can under -- given the statutory
9 objectives that they are faced with.

10 THE COURT: Yeah. Well, as you know, I just
11 received this case a few days ago, and I assume I don't know
12 it as well as you gentlemen do just yet, so I'll go back and
13 take a close look at that.

14 MR. OLIVER: Okay. Pending further questions, I'll
15 reserve some time for rebuttal.

16 THE COURT: Okay. That's fine. Thank you, Mr.
17 Oliver.

18 Mr. Ralston?

19 MR. RALSTON: If it please the Court. Your Honor,
20 I thought first I would respond directly to a number of
21 points in the colloquy between the Court and counsel, as I
22 think in many ways it frames the issues that are presented to
23 the Court. I think the colloquy illustrates that the
24 Government is simply misreading the statute. And its
25 approach to this is that if one reads the statute somehow as

1 being less than 100 percent a requirement, it does not create
2 a right. It's misreading it.

3 Our complaint lays out, I think in detail, the
4 analysis of how the proportionality provision is to work.
5 The language is straight out there, and it requires that the
6 Government make an effort to the greatest degree practicable
7 to attain proportionality. That's the standard. And as the
8 discussion indicated, there is every reason why the Court can
9 hear a claim that is predicted upon the Government's failure
10 to the greatest extent practical attempt to do
11 proportionality here, the result of which is that NCPA and
12 its members have overpaid and thus seek to get the return of
13 those funds.

14 And the -- in a sense, the Government really has in
15 its motion and even really in argument, conceded that they
16 did not try to attain material proportionality. And I'll
17 show in just a moment as I walk through some of the exhibits
18 that the Government has essentially ignored it in terms of
19 its efforts. Now, again, that's ultimately for summary
20 judgment -- I recognize that -- but for purposes of the
21 motion, the complaint and their motion demonstrate that over
22 the course of time that's relevant here they have ignored the
23 proportionality requirement, not made the effort at all to
24 attain it.

25 We're not discussing, as I'll show, a 1 or 2

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1 percent difference here. This is an order of magnitude where
2 there exists proportionality that is almost 50 percent over a
3 period of time that the statute has been in effect. I would
4 suggest that counsel's argument really goes to damages and
5 not to the issues of jurisdiction, not to the issue of
6 stating the claim, and that NCPA is clearly within the zone
7 of interest of the statutory protections of proportionality,
8 as I'll develop in somewhat greater length.

9 I thought it would be helpful for the Court for me
10 to begin my analysis today with walking through the operation
11 of the statute, and I think that's best illustrated or worked
12 through, Your Honor, by inviting the Court's attention to the
13 Complaint Exhibits 3 and 4, if the Court has that, and I do
14 have copies here if it would be helpful to the Court.

15 THE COURT: I don't think I brought the complaint
16 down with me. I do have all of the briefs.

17 MR. RALSTON: If I may approach, Your Honor.

18 THE COURT: Sure.

19 MR. RALSTON: Exhibits 3 and 4.

20 And, Your Honor, I'll also be working through and
21 correlating this with sections of the Government's motion so
22 that I can help the Court, in essence, correlate those
23 various provisions in there with our exhibit.

24 If I can approach again.

25 THE COURT: Thank you.

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1 MR. RALSTON: And, finally, I thought it would be
2 helpful if the Court has a copy of the statute, if you have
3 it available. I do have copies of that, as well.

4 THE COURT: Why don't you give it to me.

5 MR. RALSTON: If it would be of help.

6 THE COURT: I know it's here somewhere.

7 MR. RALSTON: I should say excerpts from the
8 statute, the specific Section 3407 of the Central Valley
9 part.

10 So turning to exhibit -- first Exhibit 3, Your
11 Honor, it will somewhat set the stage. That shows you the
12 invoice that comes to the Northern California Power Agency,
13 the lead Plaintiff in this matter. And as you can see, it is
14 from the Western Area Power Administration. What the area
15 power administration essentially is, an agency of the Federal
16 Government that handles the distribution of power on behalf
17 of the Department of Energy in the western parts of the
18 United States, including California.

19 And this is an invoice, as you can see, this is
20 from June of 2014, in which essentially NCPA is being billed
21 for its Restoration Fund charge for that month. And that's
22 how this is administered. They receive a monthly invoice for
23 one-twelfth of the estimated amount that is then -- it's
24 first estimated and then trued up at the end of the fiscal
25 year based on the formulas that we're going to go through.

1 Exhibit 4 is a spreadsheet that was prepared by the
2 Western Power -- Western Area Power Administration, an agency
3 of the Department of Energy. And as we set out at paragraph
4 58 of our complaint, we give you the background of how this
5 chart came to be. It was, apparently, originally the date
6 originally drawn from the Bureau of Reclamation, and then
7 updated by the Western Area Power Administration to
8 effectively demonstrate the extent of the disproportion
9 overpayment by power under the Central Valley Project
10 Improvement Act.

11 And I'm going to begin and end, really, with this
12 exhibit, the ultimate point being down in the far right-hand
13 corner of the exhibit, Your Honor, you'll see the number
14 \$87,340,245. That reflects the total of the disproportionate
15 payments by power from the beginning of the Act in 1993
16 through FY 2013. When we filed the case in August, FY 2014
17 was not yet finished, and so you only have the projected
18 revised number right beneath there for that year, and as you
19 can see, according to the Western Area Power Administration,
20 the projected disproportionate amount for that year alone
21 would be \$40,983,092.

22 So, you can see the order of magnitude of the
23 disproportionate year with that added in is -- they actually
24 give you the number, \$128 million. That is compared, if you
25 go two lines before that, two columns, you'll see

1 \$183,449,000 is what should have been paid, had it been done
2 proportionately, and so the difference, 183 versus the 87 by
3 FY 2013, was already almost 47 percent more to give you that.
4 And that essentially, in a broad way, sets out our concept of
5 what the damages would look like.

6 I would add that this chart doesn't exactly track
7 the implementation of the statute, for one reason is, as the
8 Court probably has observed, there's a ten-year rolling
9 average analysis that's part of the proportionality that
10 Congress inserted to level out the situation, because the
11 Bureau of Reclamation hasn't done a Central Valley Project
12 repayment update since 1975, despite a congressional
13 instruction to do it in 1988 by 1993, so we're still waiting
14 for them to update the 40-year-old records, there isn't a
15 definitive number.

16 So, apparently Reclamation and then Western had to
17 undertake, essentially, what is in column 6, the ten-year
18 rolling average capital analysis as a proxy for what would
19 have Congress expected to be done by the Bureau of
20 Reclamation. So, there are some differences between how the
21 statute strictly played out would be represented, but the
22 differences, I really don't think, are material for purposes
23 of what I'm going to be discussing today, Your Honor.

24 I will say that as a general matter this does lay
25 out the concept of how we approach the statute. It

1 correlates with what is in the Government's motion, as I'll
2 show in a moment. And I think it demonstrates that our
3 discussion of the facts in our opposition and in our
4 complaint as to how the statute operates, the proportionality
5 controls over revenue maximization, which is really the issue
6 here that's being joined, and the sum certain.

7 The Court may have noticed that one of the
8 arguments -- one of the complaints that the Defendant raises
9 is that the proportionality requirement doesn't lend itself
10 to a sum certain. As I just went through, the Western Area
11 Power Administration, an agency of the Department of Energy,
12 found it quite capable of using a spreadsheet to be able to
13 term the overage down to \$87 million, pretty close to a sum
14 certain, it would appear, to us, we would suggest. And, so,
15 to the extent that there is an argument that somehow a sum
16 certain doesn't flow from the proportionality requirement, I
17 think we can put that aside by virtue of Exhibit 4 in showing
18 that.

19 Now, I recognize that this presents an approach to
20 the statute that differs from that which the Government has
21 taken. And, obviously, I understand the Department of
22 Justice has the opportunity and the right to choose between
23 competing views of what its agencies may believe. And, so,
24 it's chosen to follow the Bureau of Reclamation's versus
25 Western Area Power. But I would point out that our position

1 is consistent with the position that Western Power has laid
2 out here in Exhibit 4.

3 To give the perspective from the Plaintiffs'
4 perspective of the overage that I've -- that Western Area
5 Power shows here of \$87 million, the Northern California
6 Power Agency is roughly 40 percent of that. So, NCPA is
7 roughly 40 percent of the total power user market of the
8 Central Valley Project.

9 Let me now turn to page 5 of the Government's
10 brief, and 6, where they lay out the charges that are
11 applicable. And you'll -- Your Honor, at those pages, there
12 are a total of six charges. The nomenclature may differ
13 somewhat from what is in our complaint and our opposition,
14 but we have a footnote in our opposition that explains the
15 difference, if the Court needs to go back and see that. But
16 for purposes of our argument, let's -- I'll accept this
17 presentation because it will correlate with the Government's
18 Exhibit 4, essentially.

19 The first charge you see is called "The Mitigation
20 Charge." We refer to it as "The Additional Mitigation
21 Charge," because it, in fact, is the last charge that's
22 imposed in this hierarchy. If the other charges that I'm
23 going to go through are looked at first and if they exceed,
24 for example, \$20 million, then the \$30 million not-to-exceed
25 cap is actually going down. So, to the extent that charges

1 2, 3, 4, and 5, exceed \$20 million, it reduces the cap, so to
2 speak, of the mitigation charge. So, it's the last one
3 that's looked at.

4 The mitigation charge is established in a critical
5 section, 3407(d), that really is the focus of our entire
6 analysis. It is the section that contains, also, all of the
7 limits that are relevant here, the \$30 million not-to-exceed
8 on this charge, the \$6 and \$12 per acre-foot, depending upon
9 which category of water you're in, and the proportionality
10 requirement as well. It is the limitation section, as well
11 as the establishment of the charge.

12 This is the only charge applicable to power. All
13 of the other charges that I'll discuss this morning are water
14 only. This is water and power under this one. Under "The
15 Friant Surcharge," number two, and three, the contract
16 renewal and the water transfer of tiered water are all water.
17 And then number six, "The Municipal and Industrial
18 Surcharge," also water. Numbers one and six both come out of
19 the 3407(d) sections, which is why in our complaint we
20 combined them, but the Government has presented them
21 separately.

22 As you can see from the Government's discussion in
23 paragraph one, it discusses a number of those limits and it
24 ends its paragraph with saying it contains, among other
25 things, other requirements. Well, among the other

1 requirements, of course, is the proportionality requirement
2 that brings us today here, and thus essentially the
3 Government acknowledges it is a requirement.

4 With that, let me turn to page 9 of the
5 Government's brief and do a correlation between those charges
6 and page 9. Page 9 provides a Table 1, a chart, that shows
7 you the Central Valley Project Repayment Allocation.
8 Repayment allocation, as counsel indicated, is essentially,
9 for lack of a better term, the capital contribution
10 repayments that water and power make over time to reimburse
11 the United States for its investment in the Central Valley
12 Project. And it's my understanding that that capital
13 allocation repayment is built into the rates, essentially
14 that they pay for water and power.

15 So, Congress used essentially the capital
16 contribution position as the benchmark, as the metric, for
17 the proportionality analysis. And you can see that the
18 Government breaks it out over these fiscal years. It shows
19 you agriculture as a water user and municipal and industrial
20 water, and it gives you the respective capital contributions,
21 which total together 76 percent. By contracts, power is at
22 24 percent.

23 So, when we're talking about the respective
24 proportionality, it's this 76 and 24 that's the predicate.
25 And as their footnote notes, this is from 1975, and this is

1 the study I mentioned earlier, Congress said in 1998 they're
2 supposed to update by 1992 or '93 and it has yet to be
3 updated as their footnote indicates, not yet occurred. So,
4 for purposes of my discussion today, I'm looking or would
5 suggest to the Court, the 76/24 essentially is the
6 proportionality analysis.

7 And if you go back to pages 5 and 6, you can see in
8 terms of the charges that what's being developed here in
9 terms of the agriculture and M&I, that analysis, the 76
10 percent, comes from all water and power users. So, it's not
11 just an analysis of the mitigation charge; it's over their
12 overall use.

13 And, finally, with that, let me invite the Court's
14 attention to Appendix 17, which is the actual statute, and
15 then I'll walk through to try to correlate that with the fees
16 I just went through for you. The first fee, which is the
17 mitigation fee, or as we call the additional mitigation
18 charge, is provided for in 3407(d)(2) -- (d)(2)(A), where it
19 says, "The Secretary shall require Central Valley Project
20 water and power contractors to make such additional annual
21 payments as are necessary to yield...with other receipts, the
22 amount required under paragraph (c)(2)." So, these
23 additional payments are determined by going to (c)(2).

24 (c)(2) tells us what's to be collected. In (c)(2),
25 it says that the payment in each fiscal year shall be an

1 amount "reasonably expected to equal the amount appropriated
2 each year" -- comma -- "subject to subsection (d) of this
3 section." So, the amount that is referenced in (c)(2) is not
4 the amount appropriated this year; it's not the amount that
5 the Bureau of Reclamation would like to collect. It's the
6 amount appropriated as modified by the limits that we'll
7 discuss again in section 2 -- (d). Very clear.

8 Two or three or four lines down from there,
9 Congress then said, but if after 1998, that Congress doesn't
10 appropriate more than \$50 million, we'll set \$50 million as a
11 benchmark after 1998, and that's about four lines down, where
12 it says that "the Secretary shall impose such changes in
13 fiscal year 1998 and in each fiscal year thereafter" -- comma
14 -- "subject to the limitations in subsection (d) of this
15 section." So, even in the second provision -- there's the
16 first and then the second -- Congress was unmistakable that
17 in setting the (c)(2) amount it was to be subject to the
18 subsection (d) limitations.

19 I'll refer to -- we refer to that subsection (d)
20 essentially as the fairness section because it maintains
21 those limitations that are applicable here. And as you can
22 see from this, all roads leading to the fairness section
23 require that they are subordinate to the fairness section.
24 So, Congress' instructions for the collection of money
25 clearly made the collection of money secondary, subordinate

1 to, the limits in subsection (d).

2 And even the annual appropriations act, which the
3 Government has provided as an appendix to their reply, it
4 says the amounts, as authorized, in other words to remain
5 here, is what the general language is, amounts as authorized
6 by subsection (d). So, again, every road indicates that the
7 duty to collect revenue is subordinate to the limitations
8 that are contained in subsection (d).

9 We briefly mention the limits in subsection (d).
10 First you have the not to exceed -- this is (d)(2)(A), the
11 additional payment shall not exceed 30 million, as adjusted
12 for inflation. So, that is the -- going back to again the
13 Government's page 5, the mitigation charge, number one, is
14 not to exceed 30 million, as adjusted for inflation. Second,
15 there is a per acre-foot limitation of \$6 and 12. And that
16 correlates back to the Government's page 9 chart, whereas
17 agriculture and M&I, agriculture is the 6; M&I is the 12.

18 Those are simply caps on the rate. It is not a cap
19 on the amount, because the amount to be paid is a function of
20 the rate times the number of acre-feet of water that the
21 Bureau release. At a number of points in the Government's
22 reply, they talk about cap on amount arising from 6 and 12.
23 The Government -- Congress has not capped the amount. It's
24 capped the rates applicable to the delivery of water based on
25 acre-feet.

1 And, finally, in the very last sentence of that
2 section, we come upon the language that brings us before you
3 today. "The amount of the mitigation and restoration payment
4 made by the Central Valley Project water and power users" --
5 comma, I'll underscore, my underscore -- "taking into account
6 all funds collected under this title, shall, to the greatest
7 degree practicable, be assessed in the same proportion,
8 measured over a ten-year rolling average, as water and power
9 users' respective allocations for repayment of the Central
10 Valley Project."

11 Thus, you can see from that language that the
12 proportionality provision does not just impact the mitigation
13 payment, the number one charge in the Government's brief. It
14 says take into account all of the funds that power -- I'm
15 sorry, that water pays under these charges, and when you do
16 the proportionality analysis, take into account all that
17 water has paid and use that to calculate, in effect, the
18 proportionality calculation.

19 Thus, the proportionality version is broader than
20 simply the mitigation charge and provides essential
21 protection for power because the result is it actually links
22 water and power. So, if -- I'll use the extreme example the
23 Government might suggest. If there were zero water releases
24 from the Central Valley Project in a given year, zero,
25 obviously the mitigation charge for purposes of water would

1 be zero, because six times zero is zero and 12 times zero is
2 zero. And the charges would all be zero for no releases for
3 water.

4 I add there would be no power because if there's no
5 water release, there's no turbines running, and, in fact, the
6 power would stop long before the water ran out because they
7 would reach critical dam levels where they couldn't. In that
8 circumstance, we'd go to the proportionality analysis under
9 our approach. Water has paid zero; 25 percent of -- 24
10 percent of zero is zero. Power would also not pay.
11 Absolutely fair. Water is not getting any water; power is
12 not getting any power. There's nothing to be remediated.
13 The fish arguably aren't even getting the water under that
14 scenario.

15 By contrast, under the Government's analysis, power
16 would be delivered a \$30 million bill under their scenario,
17 because under their scenario, the revenue maximization
18 somehow trumps the protections I've just gone through, allows
19 them to ignore the fairness section that I've just gone
20 through so that they can maximize the revenue in that
21 scenario. And I would suggest to you that Congress could
22 hardly have had that as an expected result here, particularly
23 when you consider -- if I may invite the Court just to go
24 back briefly to 3407(d) again.

25 And you'll see in (d)(1), Congress set out an

1 elaborate estimation process at the -- prior to the fiscal
2 year, telling the Secretary how to go through the process, do
3 the estimate, taking into account these various issues, and
4 in that analysis, all of these limits would be at play in
5 terms of the calculation. And at the end of it, the final
6 thing that would be determined would be proportionality.

7 And for proportionality, as you can see at the end
8 of (d)(2), Congress has a very detailed approach. First we
9 take into account all the funds in the title, so Congress
10 clearly envisioned its macro approach there, measured over a
11 ten-year rolling average. Obviously very concerned that this
12 would be leveled out over a multiyear period, and based on,
13 as we saw, the metrics of the Central Valley Project
14 repayment.

15 So, the suggestion that somehow this was hortatory
16 in the process simply ignores the operation overall of this
17 section of the statute in its operation as well with (c)(2)
18 and its internal operation. Our complaint lays that out, we
19 think persuasively, in terms of that Congress certainly
20 intended far more than hortatory analysis.

21 And I would think, now reaching back to counsel's
22 argument, that the motion and counsel acknowledge that if the
23 greatest degree practicable language were not in the section,
24 there'd be no question about jurisdiction, about enforceable
25 right. Does the great degree practicable language alter the

1 whole scheme because it is inserted by Congress to, in
2 essence, give some flexibility to work through this process?

3 And as you can see from the process that I've
4 analyzed, and I'll come back now and walk through the chart
5 for you, there needs to be obviously some elbow room here in
6 terms of doing these calculations. It begins with an
7 estimate; ends up with a true-up at the end of the day.
8 Trying to attain mathematical proportionality, particularly
9 when the Bureau hasn't, at this point in 40 years, done an
10 update to the Central Valley Project repayment allocation,
11 would be a challenge, but the arguments here are not over 1
12 percent or 2 percent. They're over whether they've done it
13 at all at the end of the day. That's been joined here.

14 With that, let me briefly return to Exhibit 4 and
15 walk that through for you so you'll now, I think, see how I
16 correlate each of these pieces. The first column on the
17 left, the fiscal year, obviously this is the Federal fiscal
18 year, that's what's being based.

19 The first column entitled -- second column,
20 sorry -- 3407(d)(2)(A), that shows you the combined payments
21 by power and water. So, it's essentially the combination of
22 columns 3 and 4. It's the total of those two.

23 The power column, column three, is what NCPA and
24 its other power colleagues have paid in those respective
25 years. As you can see, the total number at the bottom is

1 \$270,789,000. As I understand it, the water column is --
2 reflects, going back to the Government's brief, mitigation
3 charge one and six. Both come out of the (d)(2) section of
4 the statute.

5 And the other, the next column, reflects all of the
6 other charges that are collected over that time. And, so,
7 the total picture of power, water, and other -- in essence,
8 all of these charges is given in the column that says
9 "Total." And you can see that the total collections under
10 this program over the 20-plus-year period have been almost \$8
11 billion. And that money goes to the Bureau of Reclamation.
12 That's who essentially spends it. It's designed effectively
13 to cover the appropriations made and then essentially charged
14 to these various participants that are laid out here, over
15 the 20-year period of almost \$1 billion.

16 The next column gives you the percentage by year of
17 what power has paid compared to the water and others. And as
18 you can see -- I'll just use as the example 2013, 37.89
19 percent. WAPA then compares that to the next column for that
20 year, that the capital repayment average, as they calculate
21 it, would be 24 percent. So, that difference right there,
22 that 13 percentage points, effectively represents the
23 disproportionality, which as you can see at that point is
24 over 50 -- almost 50 percent, over 50 percent for that year.

25 The next column gives what power should be paying.

1 And the final column gives you the difference, essentially
2 the difference between what they should be paying versus what
3 they did pay, which is back at column three. That's
4 essentially how the statute operates. And the last point I'd
5 make is as you can see in terms of proportionality analysis,
6 it's a total picture. It's power as compared to water and
7 other, not just water, in terms of the mitigation charge.

8 I'll spend a few moments, if I may, Your Honor,
9 just touching on the jurisdictional points -- I'm sorry,
10 before I do that, let me give a couple summary comments in
11 terms of the chart. As I mentioned earlier, the
12 disproportionality here is over that 20-year period almost 50
13 percent. And you can see from FY 2005 on there is
14 effectively a complete lack of effort to accomplish
15 proportionality after 2005. And you can see that --

16 THE COURT: Let me ask a question. What exactly is
17 the true-up process that you described that occurs at the end
18 of the year?

19 MR. RALSTON: Yes, Your Honor, it's my
20 understanding --

21 THE COURT: How do end up with such a large
22 disproportionality if you're doing a true-up?

23 MR. RALSTON: In effect, what occurs, as I
24 understand it is when they do the true-up, the Government --
25 the Bureau of Reclamation has said as they've said

1 essentially in their motion, well, we go to (d)(2), and we
2 see that number 30 million that says "shall not exceed." We
3 call that a minimum. So, you water and power folks owe us 30
4 million.

5 We've done the water analysis under the mitigation
6 number one charge, and at \$6 and \$12 times X acre-feet of
7 water -- I'll use an example -- but you can see right in the
8 chart if you want an accurate example, it's only 5 million.
9 So, power, here's your invoice for \$25 million. So, the
10 true-up is a true-up effectively under their analysis at the
11 end of the year. That -- so, it isn't a true-up on
12 proportionality. They ignore proportionality and just send
13 us an invoice for the difference between whatever power --
14 sorry, water put in and power makes up the difference.

15 That essentially is the Government's scheme, is
16 that at the end of the day, they run that number and if there
17 is some difference between what power -- water has put in,
18 I'm sorry, under the mitigation charge and 30 million, power
19 pays the difference. And, so, my example, if there were no
20 water at all, the bill to us would be \$30 million under their
21 theory, both as originally estimated and as trued up at the
22 end of the day for that.

23 As we understand the Government's argument, it's
24 that the term "greatest degree practicable" was put into the
25 bill -- into legislation so that they didn't have to do

1 anything at all on proportionality. So, as we read it,
2 Congress says go to the right and do the greatest extent
3 practicable in doing proportionality, and the Bureau of
4 Reclamation reads it, no, no, no, it means we don't have to
5 do anything, we can elect in terms of their interpretation.
6 And I think that illustrates how off the mark they are in
7 terms of their misreading of the statute. They don't even
8 look at proportionality as the example in that chart
9 indicates.

10 And it strikes again us that Congress has set up a
11 very detailed formula and approach here and it all runs
12 contrary to the argument that this isn't a requirement, that
13 it's somehow a goal.

14 I'll also point out that in the 20 years -- 20-plus
15 years of the Central Valley Project Improvement Act, there
16 has been no rulemaking by the Bureau of Reclamation
17 expressing the positions that have been asserted in the
18 motion, in this litigation. So, we're not talking about the
19 Court reviewing reasoned agency decision-making here. It has
20 never been subject to notice and comment. They've done a
21 couple of putative runs and they've talked about they're
22 going to do it and never carried forward.

23 So, the arguments that you see in the motion
24 essentially are arguments of counsel in terms of how the
25 situation came about. Now, the chart illustrates they've

1 ignored proportionality. I don't dispute that at all, but
2 when you get beyond that, there is no official notice and
3 comment rulemaking position by the agency here.

4 Let me turn briefly onto the jurisdictional points.
5 We set out at our brief, opposition brief 9-10, the basic
6 requirements for an illegal exaction case. In our view, laid
7 out under the Aerolineas Argentinas and Eastport decision,
8 requiring that the Government -- that the Plaintiff show they
9 paid money to the Government here directly and seek a refund
10 of it in the amount that was improperly paid or exacted. As
11 we indicated in our notice filing yesterday, Your Honor has
12 issued the decision in the Starr International case --

13 THE COURT: I'm somewhat familiar with the case.

14 MR. RALSTON: -- you're more than familiar with
15 these points, and there's nothing that I could add to the
16 substance of that knowledge at this point, other than to give
17 you some comments in terms of how this case seems to fit
18 within that framework. Your decision clarified that there
19 really are two strains of thought here with respect to the
20 standard. The one that seems not to encompass the money-
21 mandating requirement expressly and then the Norman line of
22 cases that do.

23 In this case, I'd suggest that that distinction
24 really is not going to be of import because the exaction here
25 readily meets the Norman standard. It is akin to a tax or

1 awfully close to a tax, which as the Starr decision points
2 out is the quintessential example of an illegal exaction.
3 And if you follow the application that the Bureau of
4 Reclamation has here, it is a tax because it's completely
5 devoid of any relationship to the proportionality
6 requirement. So, if it's a tax, this Court has jurisdiction
7 to review it.

8 The implicit right to the refund arises from the
9 limit that the statute places on the Bureau's ability, the
10 Secretary's ability to collect the funds. That's where it
11 arises from. And proportionality, whether it has an element
12 of discretion or not, is obviously a limit on the Secretary's
13 ability to impose and assess the fines. That by necessary
14 implication tees up illegal exaction jurisdiction.

15 And the Government, as I pointed out earlier,
16 admits that but for the greatest degree practicable language
17 the CVPIA is that kind of statute. It would fall within the
18 money-mandating class. And, candidly, how could they not
19 agree to that given that the CVPIA is an authorization
20 statute and it every year keys in with an annual
21 appropriations law. I don't know how you could get much
22 closer to being money-mandating. In some ways, that's more
23 money-mandating than the Fifth Amendment may be money-
24 mandating for takings purposes. There's more specificity
25 here than there is the Fifth Amendment.

1 In the Cyprus Amax case with respect to the export
2 clause, an illegal exaction case, there's no sum certain
3 requirement in there, and yet the Federal Circuit had, at the
4 end of the day, no difficulty determining that the export
5 clause is an illegal exaction clause. As I pointed out, we
6 are, if anything, closer to that and really in some ways
7 close to illegal exaction than the issues that the Court had
8 to review in the Starr International case.

9 The last point that I would make on that is that as
10 I said a moment ago, the Government's really only objection
11 is the discretionary aspect of the proportionality mandate,
12 and they cite it in response to us the Hinck vs. U.S. case,
13 64 Fed. Cl. 71 at 77 to suggest that this analysis isn't just
14 a superficial one, that one doesn't just go to our complaint
15 and look at it. We're not suggesting that. We have to
16 allege it in the complaint. Of course, we recognize the
17 Court has to actually find that jurisdiction exists, it's not
18 simply a complaint analysis.

19 But even in the Hinck case, I invite the Court's
20 attention to that. Judge Allegra laid out his standard o
21 what the not superficial analysis would be, and essentially
22 it is all we have to show is that there's a basis for the
23 claim of illegality here, that the collection is illegal. We
24 readily meet that standard, and that's under the brief -- I'm
25 sorry, in the case the Government tells us is the demanding

1 requirement.

2 And I think really the last point I would cover,
3 Your Honor, is a few of the points that the Government has
4 made with respect to statutory history; for example, the fact
5 that they mention that in their argument. The fact that the
6 clause was added in the course of the legislative process and
7 the greatest degree practicable clause, it's arguably called
8 even legislative history. There's no explanation as to why
9 it was added. We don't -- obviously, it is in the final
10 legislation, at the end of the day, and it's the one we've
11 operated with here.

12 Its addition, we've provided a number of ready
13 explanations of why Congress would have understandably
14 considered it needed. Estimation, true-up process, the fact
15 that one has to deal with what happens on the ground in the
16 course of a year between the estimate and the true-up
17 process. The Bureau of Reclamation had yet to do its update
18 on the Central Valley Project Improvement Allocation aspect.
19 And in some ways actually because it protects water, and I'll
20 take a moment to explain that because I think it helps
21 illustrate how the statute could operate.

22 If from the non-mitigation charges, so if from two
23 through five, in the Government's brief, in a year -- if \$40
24 million were collected from that, the mitigation charge would
25 only be 10, the balance of the 50. In calculating

1 proportionality, it is not just the mitigation charge,
2 however. It is the whole picture. So, if water has already
3 paid 40 million, which is 80 percent of the 50, exceeding the
4 76 percent that it's allocation percentage was, it owes
5 nothing more. Power would pay the balance -- \$10 million in
6 that case.

7 So, by virtue of the proportionality clause, water
8 actually gets the benefit at the end of the day. It's
9 designed to protect water as much as it protects power under
10 that circumstance. It is not unbalanced, and that goes
11 directly, I think, to counsel's argument that somehow there's
12 an imbalance of protection because water has a rate cap and
13 power doesn't. Power buys its power through the Western Area
14 Power Administration, not from the Bureau of Reclamation
15 directly. The CVPIA doesn't, as far as I know, govern
16 electric resources.

17 It made very good sense for a different treatment,
18 providing a global resolution and global protection for all
19 of the parties, which is just what the proportionality clause
20 does. And we suggest to the Court that the Court should
21 follow, obviously, what Congress stipulated or lays out in
22 terms of taking a fairness approach versus the revenue
23 maximization that the Government has followed and that the
24 Bureau has followed.

25 With that, Your Honor, I appreciate the time that

1 the Court has given me and certainly am available for
2 questions.

3 THE COURT: Yes, thank you, Mr. Ralston.

4 Mr. Oliver, would you like some rebuttal time?

5 MR. OLIVER: Just briefly just to go over some --

6 THE COURT: Sure, yes. That's fine.

7 MR. OLIVER: Counsel stated in his remarks that the
8 Bureau of Reclamation had made no attempt to achieve the
9 proportionality goal and if you look at page 9 of our brief,
10 which he gave you as an exhibit, the table, which shows the
11 CVP rate -- repayment allocation, saying 24 for power in the
12 right-hand corner, from '96 to 2005, that was the amount they
13 were assessed, the amount of the repayment allocation; where
14 in 1997 to 2006, 1 percentage over that.

15 The following year -- the following ten-year
16 average, '98 to 2007, again 25 compared to repayment
17 allocation of 24, the point being Reclamation was able to
18 achieve proportionality in the very beginning. And what
19 changed? What changed was what I mentioned in my earlier
20 remarks, the system -- and we're going to -- we're going to
21 get into this, you know, I assume. In terms of how this
22 statute is set up, I mean, we spent a lot of time talking
23 about statutory interpretation, but under our interpretation
24 of the statute, what I believe is correct, you start out with
25 the 30 million, based upon the appropriation language, which

1 states that the Bureau of Reclamation is directed to assess
2 and collect the full amount of the additional mitigation and
3 restoration payments authorized by Section 3407(d).

4 So, my point about water, in terms of capping the
5 rate, well, if the water deliveries are low, that's going to
6 affect how much can be assessed, and that's exactly what
7 explains why the proportions started to increase over time,
8 is because water was not -- was not being assessed as much.
9 And what power could contribute is going to be tied to what
10 water can contribute, because \$30 million is a mandatory
11 ceiling.

12 Their suggestion that it's not is based upon -- and
13 this all comes down to interpretation of the phrase "to the
14 greatest extent practicable." And, again, I think they read
15 that provision or that phrase out of the statute for purposes
16 of their interpretation. They read it as there should be a
17 right to proportionment, and if it's not proportioned, then
18 Congress has directed that through prorations that you assess
19 the full amount must be necessarily reduced, whereas our
20 interpretation is no, it doesn't say "shall be proportional,"
21 period. It says "shall to the greatest extent practicable."
22 And given -- where that import, that means that it is a goal
23 but it may not be achieved in light of other statutory
24 objectives, including the \$30 million.

25 I'll end on this minor point. We spent some

1 time -- or we, actually counsel spent some time on Western
2 Power Administration's invoice, Exhibit 3, and at one point
3 stated that this was Western's position in this -- this
4 represents WAPA's litigation position or its position on how
5 it interprets the statute, whereas, in fact, this is simply
6 their calculation of the amounts that -- the calculations of
7 the assessments, that WAPA hasn't, as far as I know, taken an
8 official position on this litigation.

9 One second. Let me confer.

10 (Brief pause.)

11 MR. OLIVER: And one last thing I just want to
12 clear up. You asked Mr. Ralston about the true-up process,
13 and I do want to clarify that. The true-up process -- and
14 it's actually referenced in the statute in terms of
15 3407(d)(1) in terms of the Bureau of Reclamation at the very
16 beginning of the fiscal year -- prior actually to each fiscal
17 year will estimate the assessment, and then there will be a
18 true-up based upon the actual water deliveries that occurred
19 during that year because the assessment for water and taxable
20 power as well will depend upon how water -- you know, how
21 much water deliveries there are.

22 If it's fairly high, the ceiling, therefore, will
23 be higher because the rate is \$6
24 per acre-foot, so if the water goes up high, the ceiling
25 that they can charge water will be that much higher. So,

1 that's -- that's the true-up process.

2 THE COURT: Okay. All right.

3 MR. OLIVER: Unless you have any further questions.

4 THE COURT: No, I think I've got a good
5 understanding of it. Thank you, Mr. Oliver. Thanks to both
6 of you for your presentations today. I will take the matter
7 under advisement, and I'll have a ruling for you in the near
8 future.

9 (Whereupon, at 11:06 a.m., the hearing was
10 adjourned.)

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Northern California Power Agency, et al. v. USA

6/17/2015

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